BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02(W)-809–04 OF 2016 AND Q-02(A)-810–04 OF 2016
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
23 JANUARY 2018

Contract — Frustration — Sale and purchase — Parties entered into agreement for sale and purchase of land ('SPA') which contained condition vendor had to obtain consent to transfer from Director of Land and Survey Sarawak — Vendor forwarded application to Superintendent of Land and Survey Department of Bintulu Division instead and gave wrong description of land — Application for consent rejected — Vendor refused to appeal or re-submit proper application despite buyer's requests — Whether vendor could repudiate SPA citing impossibility of performance and frustration as reason — Whether frustration self-induced — Whether court could not order specific performance of SPA as that would contravene law by overriding requirement for consent to be obtained — Whether damages in lieu of specific performance appropriate remedy as it not shown that land was unique and could not be substituted with damages — Whether buyer's caveat to be removed as he ceased to have further interest in land — Whether parties were at liberty to decide how assessment of damages before registrar should be done — Whether trial judge could not order that assessment of damages must be done pursuant to either s 75 of the Contracts Act 1950 or any specific provision of SPA when it was never issue at trial

The appellant owned a piece of land ('the land') which it agreed to sell to the respondent. The transaction was subject to the condition that the appellant had to obtain written consent to transfer from the Director of Land and Survey Sarawak ('the director'), as stated in the land's document of title. The sale and purchase agreement ('SPA') between the parties provided that if the appellant failed, refused or was unable to execute the transfer of the land to the respondent, the latter was entitled to treat the SPA as cancelled and the appellant would then have to refund all deposits it had received from the respondent besides having to pay pre-estimated liquidated damages. As permitted by the SPA, the respondent lodged a caveat to prevent any dealing in the land. The common solicitor acting for both parties submitted the application for consent to transfer ('the application') on the appellant's behalf, but instead of sending it to the director, the application was sent to the Superintendent of Land and Survey Department of Bintulu Division and the land was also wrongly described in the application. When the appellant received notice that the application had been rejected, it informed the

A respondent that the SPA could not be completed on account of the rejection and refunded the deposit to the respondent. The respondent rejected the appellant's repudiation of the SPA, returned the deposit and asserted that it was prepared to pay the balance purchase price and complete the SPA. The respondent requested the appellant's permission to appeal against the rejection
B of the application or to submit a fresh one to the director but the appellant rejected the proposal. The respondent sued the appellant in the High Court for, inter alia, an order for specific performance of the SPA; alternatively, for damages for breach of contract. Meanwhile, the appellant, by way of an originating summons ('the OS') applied to have the respondent's caveat
C removed and sought damages for wrongful entry of the caveat. Both matters were consolidated and heard together. At the conclusion of the trial, the High Court dismissed both the respondent's suit and the OS and ordered the appellant to pay the respondent damages for breaching the SPA. Six days after
D delivering that decision in open court, the trial judge 'clarified' his judgment by making a further order that the senior assistant registrar ('SAR') of the court assess the said damages either pursuant to s 75 of the Contracts Act 1950 or cl 6 of the SPA. In dismissing the respondent's suit and the OS, the trial court held that: (a) the SPA had not become frustrated or impossible of performance
E since the appellant had deliberately chosen not to appeal against the rejection of the application or to re-file an error-free application addressed to the proper party. Instead of rectifying the situation, the appellant had wrongly repudiated the SPA and this showed it had no intention of completing the agreement; (b) an order of specific performance of the SPA could not be granted because
F that would override and contravene an express provision of law requiring the director's consent to be obtained before the land could be transferred; and (c) the prayer for the removal of the caveat could not be granted as the respondent had validly entered the caveat pursuant to cl 8 of the SPA and had shown a caveatable interest in the land. In the instant appeals by the parties
G against the High Court's decision, the respondent argued that the trial judge erred in refusing the order for specific performance, and in ordering the damages payable in lieu of specific performance to be assessed pursuant to only s 75 of the Contracts Act 1950 or cl 6 of the SPA. The appellant, on the other hand, argued that the trial judge erred in refusing to order the removal of the
H respondent's caveat.

Held, (a) affirming the trial court's decision that the SPA still subsisted and that the doctrine of frustration did not apply; that an order for specific performance of the SPA could not be granted and that damages in lieu of specific
I performance be paid to the respondent as assessed by the SAR; (b) ordering that the parties were at liberty to argue on the course to be taken in the assessment of damages before the SAR; and (c) allowing the appeal against the dismissal of the appellant's application to have the respondent's caveat removed:

(1) The doctrine of frustration applied only in circumstances where the supervening event was beyond the control of the parties to the contract. It followed that where the alleged frustrating event was caused by the deliberate act or decision of one of the parties, or by his negligence, the doctrine would not apply. The evidence showed that at all times the respondent was able, ready and willing to perform its obligations under the SPA to complete the purchase of the land but the appellant had refused to perform its end of the bargain by self-induced frustration (see paras 47 & 49).

(2) This court was persuaded, on the reasons proffered by the trial judge, that the appellant's refusal to re-submit or appeal to the director for the requisite consent to transfer was self-induced frustration. The appellant failed to strictly comply with the requirement of the special condition in the land title by not submitting a proper application directly to the director but had submitted the application to the Superintendent of Land and Survey of Bintulu Division instead. And even though the respondent had requested it to do so, the appellant had refused or neglected to appeal directly to the director for the requisite consent. The director, himself, had testified at the trial that no application for the consent was made directly to him. The director also testified that the application contained serious errors in that the title was described as being 'in perpetuity' and as being registered on 22 November 1996 when, in fact, the term of the title was 60 years and it was registered on 15 August 2012. The director testified that the rejection of the flawed application was appealable with a high chance of success, but the appellant chose not to appeal (see paras 45–46).

(3) This court agreed with the trial judge that in the circumstances of the case, specific performance of the SPA should not be granted because the express consent to transfer had not been obtained. If an order of specific performance was granted it would have contravened an express provision of the law. In the instant case, damages were an adequate remedy in the absence of evidence to show that the land was unique in the sense that there was no readily available substitute for it. The land was not uniquely identified by the parties in the SPA or at the trial (see paras 55 & 61–62).

(4) The trial judge should not have ordered damages in lieu of specific performance to be assessed either under s 75 of the Contracts Act 1950 or cl 6 of the SPA when 'clarifying' his judgment on 24 March 2016. If specific performance was not granted, it was an open issue as to how damages ought to be assessed or whether cl 6 of the SPA was open to challenge at the hearing of the assessment of damages. Neither s 75 of the Contracts Act nor cl 6 of the SPA for the purpose of assessing damages were pleaded by the parties nor adjudicated at the trial nor was it dealt with by the parties in their submissions or in the grounds of judgment. In

any case, after the trial judge had delivered his judgment on 18 March 2016, he was functus officio as far as the issue of damages was concerned. As such, the trial judge's order was varied to state that the parties were at liberty to submit on the approach to be taken in the assessment of damages before the SAR (see paras 65–67).

(5) Since the trial judge had rejected the application for specific performance and ordered damages to be assessed by the SAR, the respondent's only interest was monetary and it no longer had any interest in preserving the caveat. The balance of convenience tilted in favour of the removal of the caveat (see paras 70 & 72).

[Bahasa Malaysia summary

Perayu memiliki sebidang tanah ('tanah tersebut') yang disetujui untuk dijual kepada responden. Transaksi ini tertakluk kepada syarat bahawa perayu perlu mendapatkan kebenaran bertulis daripada Pengarah Tanah dan Survei Sarawak ('pengarah') untuk memindah milik, seperti yang dinyatakan dalam dokumen hak milik tanah. Perjanjian jual beli ('PJB') antara pihak-pihak memperuntukkan bahawa jika perayu gagal, enggan atau tidak mampu melaksanakan pindah milik tanah tersebut kepada responden, responden berhak menganggap PJB sebagai terbatal dan perayu perlu memulangkan kesemua deposit yang telah diterima dari responden selain perlu membayar anggaran ganti rugi jumlah tertentu. Seperti yang dibenarkan oleh PJB, responden memasukkan kaveat untuk mengelakkan apa-apa urusan atas tanah. Peguam cara bersama yang bertindak bagi kedua-dua pihak menyerahkan kebenaran memindah milik ('permohonan') bagi pihak perayu tetapi bukan kepada pengarah; permohonan tersebut diserahkan kepada Jabatan Superintenden Tanah dan Survei Daerah Bintulu dantanah tersebut digambarkan secara salah dalam permohonan. Apabila perayu menerima notis bahawa permohonan telah ditolak, perayu memaklumkan responden bahawa PJB tidak boleh disempurnakan kerana penolakan dan deposit dipulangkan kepada responden. Responden menolak repudiasi PJB perayu, memulangkan deposit dan menghujahkan bahawa ia bersedia membayar baki jumlah belian dan menyempurnakan PJB. Responden memohon kebenaran perayu untuk merayu terhadap penolak permohonan atau mengemukakan permohonan baharu kepada pengarah tetapi perayu menolak cadangan ini. Responden menyaman perayu di Mahkamah Tinggi bagi, antara lain, satu perintah pelaksanaan spesifik PJB; secara alternatifnya, ganti rugi pelanggaran kontak. Pada masa yang sama, perayu, melalui saman pemula ('SP') memohon agar kaveat responden disingkirkan dan memohon ganti rugi bagi kemasukan salah kaveat. Kedua-dua hal digabungkan dan didengar bersekali. Pada penutup perbicaraan, Mahkamah Tinggi menolak kedua-dua guaman responden dan SP dan memerintahkan perayu membayar responden ganti rugi kerana melanggar PJB. Enam hari selepas penyampaian keputusan ini dalam mahkamah terbuka, hakim bicara 'menjelaskan' penghakiman beliau dengan

membuat perintah lanjutan agar Penolong Kanan Pendaftar ('PKP') mentaksir ganti rugi tersebut sama ada melalui s 75 Akta Kontrak 1950 atau klausa 6 PJB. Dalam menolak guaman responden dan SP, hakim bicara memutuskan: (a) PJB gagal atau tidak mungkin boleh dilaksanakan kerana perayu sengaja memilih untuk tidak merayu terhadap penolakan permohonan atau memfailkan semula permohonan yang bebas daripada kesalahan, dialamatkan kepada pihak yang betul. Sepatutnya membetulkan situasi tersebut, perayu tersalah merepudiasi PJB dan ini menunjukkan ia tiada niat menyempurnakan perjanjian; (b) satu perintah pelaksanaan spesifik PJB tidak boleh diberi kerana akan melangkau atau melanggar peruntukan nyata undang-undang yang mengkehendaki kebenaran pengarah diperoleh sebelum tanah tersebut boleh dipindah milik; dan (c) permohonan penyingkiran kaveat tidak boleh diberi kerana responden memasukkan kaveat secara sah bawah klausa 8 PJB dan menunjukkan kepentingan boleh dikaveat dalam tanah. Dalam rayuan-rayuan ini oleh pihak-pihak terhadap keputusan Mahkamah Tinggi, responden menghujahkan bahawa hakim bicara terkhilaf kerana menolak perintah pelaksanaan spesifik dan memerintah ganti rugi dibayar sebagai ganti pelaksanaan spesifik untuk ditaksir hanya bawah s 75 Akta Kontrak 1950 atau klausa 6 PJB. Perayu, sebaliknya, menghujahkan hakim bicara terkhilaf kerana memerintahkan penyingkiran kaveat responden.

Diputuskan, (a) mengesahkan keputusan mahkamah bicara bahawa PJB masih wujud dan bahawa doktrin kegagalan tidak terpakai; dan perintah pelaksanaan spesifik PJB tidak boleh diberi dan agar ganti rugi sebagai ganti pelaksanaan spesifik dibayar kepada responden seperti yang ditaksir oleh PKP; (b) memerintahkan bahawa pihak-pihak boleh menghujahkan langkah-langkah yang hendak diambil dalam taksiran ganti rugi di hadapan PKP; dan (c) membenarkan rayuan terhadap penolakan permohonan perayu untuk menyingkirkan kaveat responden:

(1) Doktrin kekecewaan hanya digunakan dalam keadaan di mana penyeliaan berada di luar kawalan pihak-pihak berkontrak. Ini diikuti di mana peristiwa yang mengecewakan itu disebabkan oleh perbuatan atau keputusan sengaja salah satu pihak atau oleh kecuaiannya, doktrin itu tidak akan terpakai. Bukti menunjukkan pada setiap masa responden boleh, bersedia dan sanggup melaksanakan kewajipannya di bawah PJB untuk menyempurnakan belian tanah tetapi perayu menolak untuk melaksanakan janjinya melalui kekecewaan yang dibangkitkan sendiri (lihat perenggan 47 & 49).

(2) Mahkamah ini bersetuju, atas sebab-sebab yang dinyatakan oleh hakim bicara, penolakan perayu untuk mengemukakan semula atau merayu kepada pengarah terhadap kebenaran yang diperlukan untuk memindahkan adalah kekecewaan yang dibangkitkan sendiri. Perayu tidak mematuhi sepenuhnya syarat khas dalam hak milik tanah dengan tidak mengemukakan permohonan yang sepatutnya kepada pengarah

A tetapi telah mengemukakan permohonan ini pada Penguasa Tanah dan Survei Bahagian Bintulu. Dan walaupun responden telah memohon untuk berbuat demikian, perayu telah menolak atau mengabaikan untuk merayu terus kepada pengarah terhadap persetujuan yang diperlukan. Pengarah, sendiri, telah memberi keterangan semasa perbicaraan bahawa B permohonan persetujuan tersebut tidak dibuat secara langsung padanya. Pengarah juga memberi keterangan bahawa permohonan itu mengandungi kesilapan yang serius di mana tajuk itu digambarkan sebagai 'selama-lamanya' dan didaftarkan pada 22 November 1996 sedangkan, hakikatnya, hak milik ini adalah 60 tahun dan telah C didaftarkan pada 15 Ogos 2012. Pengarah mengesahkan bahawa penolakan permohonan cacat itu boleh dirayu dengan peluang yang tinggi untuk berjaya tetapi perayu memilih untuk tidak merayu (lihat perenggan 45–46).

D (3) Mahkamah ini bersetuju dengan hakim bicara bahawa dalam keadaan kes tersebut, pelaksanaan spesifik PJB tidak boleh diberi kerana persetujuan nyata untuk pindah milik tidak diperolehi. Sekiranya satu perintah pelaksanaan spesifik diberi maka ia akan melanggar peruntukan undang-undang. Dalam kes ini, ganti rugi adalah remedi yang E mencukupi dengan ketiadaan keterangan untuk menunjukkan bahawa tanah itu adalah unik dalam erti kata bahawa tiada pengganti yang mudah didapati untuknya. Tanah itu tidak dikenal pasti secara unik oleh pihak-pihak dalam PJB atau semasa perbicaraan (lihat perenggan 55 & 61–62).

F (4) Hakim bicara tidak boleh memerintahkan ganti rugi sebagai ganti pelaksanaan spesifik untuk ditaksir sama ada di bawah s 75 Akta Kontrak 1950 atau klausa 6 PJB apabila 'menjelaskan' penghakimannya pada 24 Mac 2016. Jika pelaksanaan spesifik tidak diberi, adalah isu terbuka G tentang bagaimana ganti rugi harus ditaksir atau sama ada klausa 6 PJB terbuka untuk dicabar pada pendengaran penilaian ganti rugi. Seksyen 75 AK mahupun klausa 6 PJB, bagi tujuan taksiran ganti rugi, tidak dikemukakan oleh pihak-pihak yang tidak diadili pada perbicaraan atau tidak ditangani oleh pihak-pihak dalam penghujahan mereka atau H berdasarkan alasan penghakiman. Walau apa pun, selepas hakim bicara menyampaikan penghakimannya pada 18 Mac 2016, beliau *functus officio* setakat berkenaan isu ganti rugi. Oleh itu, perintah hakim bicara dipelbagaikan untuk menyatakan bahawa pihak-pihak bebas mengemukakan pendekatan yang akan diambil dalam taksiran ganti rugi di hadapan PKP (lihat perenggan 65–67).

I (5) Oleh kerana hakim bicara telah menolak permohonan untuk pelaksanaan spesifik dan memerintahkan ganti rugi untuk ditaksir oleh PKP, satu-satu kepentingan responden adalah monetari dan ia tidak lagi mempunyai kepentingan mengekalkan kaveat. Imbangan

kebarangkalian condong memihak pada penyingkiran kaveat (lihat perenggan 70 & 72).]

Notes

For cases on sale and purchase, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5269–5276.

Cases referred to

Agrokor Sdn Bhd v Perkayuan TM (Malaysia) Sdn Bhd [2015] MLJU 961; [2015] 6 CLJ 594, HC (refd)
Bandar Eco-Setia Sdn Bhd v Yiap Beow Soon and Anor [2009] MLJU 1388; [2010] 5 CLJ 556, CA (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Chow Chin Thong @ Chau Chin Tang v Dr Chong Eng Leong @ Ching Eng Leong (sued as the administrator of the estate of Ku Hui Kin @ Ku Hui Kim) [2010] MLJU 942; [2012] 10 CLJ 273, HC (refd)
City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285; [1985] CLJ Rep 77, FC (refd)
Eng Mee Yong v Letchumanan [1979] 2 MLJ 212, PC (refd)
Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd [1994] 3 MLJ 192, SC (refd)
Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)
Hong Leong Bank Bhd v Tan Siew Nam & Anor [2014] 5 MLJ 34; [2014] 7 CLJ 293, CA (refd)
Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd [2007] 7 MLJ 23, CA (refd)
J Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1989] 1 Lloyd's Rep 148 (refd)
Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd, The Kingswood [1942] AC 154, HL (refd)
Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1, CA (refd)
Loh Koon Moy & Anor v Zaibun SA bt Syed Ahmad [1978] 2 MLJ 29, FC (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53, FC (refd)
Maritime National Fish Ltd v Ocean Trawlers Ltd [1935] AC 524, FC (refd)
Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia) [1964] 2 QB 226, CA (refd)
Reignmont Estate Sdn Bhd v Jaya Ikatan Plantations Sdn Bhd [2014] 5 CLJ 134, CA (refd)
Satyabrata Ghose v Mugneeram Bangur & Co 1954 AIR 44, SC (refd)
Semelhago v Paramadevan [1996] 2 SCR 415, SC (refd)
Sivapragasam s/o Nagamany v Amaravathy d/o v Nadeson & Puvaneswary d/o As Lingam [2001] MLJU 715; [2001] 8 CLJ 706, HC (refd)
Tan Ah Tong v Parveen Kaur [2011] 5 MLJ 428; [2012] 10 CLJ 159, CA (refd)

A *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, PC (refd)

Legislation referred to

Contracts Act 1950 ss 57, 57(2), 75
Specific Relief Act 1950 s 11(2)

B

Appeal from: Suit No BTU-22–5/9 of 2013 and Originating Summons No BTU-24–10/7 of 2013 (High Court, Bintulu)

Paul Tang Nguong Wee (Camillus Lau Sii Fang and Norman Liew Hock Zee with
C *him) (Tan, Yap & Tang Advocates) for the appellant.*
Henry Ling (Ling & Wong Advocates) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

D **[1]** These two related appeals concern the alleged refusal of the respondent/defendant to complete a transaction for the sale of a parcel of land situated at Kidurong Road, Bintulu and described as Lot 2072 Block 26 Kemena Land District ('the said land').

E ANTECEDENTS

[2] These appeals emanate from the following two High Court cases, namely:

F (a) High Court Suit No BTU-22–5/9 of 2013 (the summons) and now referred to as Civil Appeal No Q-02(W)-809–04 of 2016; and

(b) High Court Originating Summons No BTU-24–10/7 of 2013 (the originating summons to remove caveat) and now referred to as Civil Appeal No Q-02(A)-810–04 of 2016.

G

[3] Before the High Court, these two cases were consolidated and heard together.

H **[4]** The claim of the appellant/plaintiff in the High Court action (High Court Suit No BTU-22–5/9 of 2013) were essentially for:

(a) specific performance of the sale and purchase agreement ('SPA');

(b) all necessary and consequential accounts, directions and inquiries;

I (c) further or alternatively, damages for breach of contract with assessment of damages on the consequential loss and damages and interest thereon;

(d) interest; and

(e) costs.

[5] In BTU-24–10/7 of 2013, the respondent/defendant applied to remove a caveat lodged by the plaintiff and for damages for the alleged wrongful lodgement of the caveat.

[6] After full trial, on 18 March 2016, the learned High Court judge made the decision in open court and further clarified the decision on 24 March 2016. The learned High Court judge made the following orders:

(a) the appellant/plaintiff's action in High Court Suit No BTU-22–5/9 of 2013 be dismissed with costs;

(b) an order of specific performance of the SPA shall not be granted against the respondent/defendant;

(c) the respondent/defendant's counterclaim in Originating Summons No BTU-24–10/7 of 2013 be dismissed;

(d) damages for breach of the SPA is awarded to the respondent/defendant and the senior assistant registrar shall assess the damages either under s 75 of the Contract Act 1950 or cl 6 of the SPA; and

(e) global costs of RM55,000 is awarded to the appellant/plaintiff in respect of Suit No BTU-22-5/9 of 2013 and Originating Summons No BTU-24–10/7 of 2013.

[7] Dissatisfied with the impugned decision, the appellant/plaintiff appealed against the whole of the said decision and the respondent/defendant appealed against the part of the decision where the learned High Court judge refused to grant an order for the specific performance of the contract for the purchase of the said land and the decision of the learned High Court judge in ordering the damages to be assessed either under s 75 of the Contracts Act 1950 or cl 6 of the contract at the clarification on 24 March 2016. Hence, these appeals before us.

[8] For ease of reference, in this judgment, the parties will be referred to as they were at the High Court.

FACTS OF THE CASE

[9] The facts of the case are relatively straightforward and can be summarised within a brief compass.

[10] The defendant is the registered proprietor of the said land. The said parcel was for sale. The plaintiff was interested in buying the said land.

A **[11]** Both the defendant and the plaintiff entered into a SPA dated 26 June 2012 where in terms whereof the defendant agreed to sell the said land for the price of RM3.1m. The plaintiff paid RM620,000 as deposit and part payment upon the signing of the SPA and the balance to be paid within three months upon receiving the consent in writing for the transfer of the said land by the B Director of Land and Survey Sarawak.

[12] By cl 6 of the SPA, the parties agree that in the event the defendant fails, refuses or unable to execute the transfer of the said land in the manner stated in the SPA in favour of the plaintiff, the plaintiff is entitled to treat SPA as C cancelled, null and void as by mutual consent and the defendant shall refund the said RM620,000 and thereupon the defendant shall pay the pre-estimated liquidated damages. Parties shall have no claim for costs, compensation or specific performance.

D

[13] It is a common ground that both parties were aware of the special conditions that the said land cannot be transferred without the consent in writing of the Director of Land and Survey, Sarawak.

E **[14]** Pursuant to cl 8 of the SPA, the plaintiff had lodged a caveat against any dealing of the said land.

[15] Written application for consent of the Director of Land and Survey, Sarawak was made by the common solicitor acting for both the defendant and F the plaintiff, Messrs Kadir, Wong, Lin & Co, Advocates (Bintulu).

[16] On 12 March 2013, the Director of Land and Survey, Sarawak rejected the said application by stating that the application is 'adalah tidak dapat G dipertimbangkan'.

[17] By a letter dated 28 March 2013, issued by the defendant's advocates, the plaintiffs was informed by the defendant that the SPA cannot be completed and treated the SPA as void and offered to refund the said RM620,000 by a H cheque to the plaintiff.

[18] By a letter dated 2 April 2013, issued by the plaintiff's advocates, the plaintiff refunded the said cheque to the defendant, and rejected the defendant's repudiation of the SPA. The plaintiff pleaded that at all the I material times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA.

[19] The plaintiff vide a letter dated 18 March 2013, informed the defendant that it rejected a repudiation of the SPA and was prepared to pay the

balance of the purchase price to the plaintiff prior to the necessary transfer of the said land if the defendant could duly execute all the necessary instruments and documents, including memorandum of transfer, power of attorney with full powers to do all matters as the registered proprietor could do personally and the written permission to appeal or re-submit the application for consent of the transfer of the said land but this was rejected by the defendant.

[20] By a letter dated 20 May 2013, the common solicitor acting for both the plaintiff and the defendant, Messrs Kadir, Wong, Lin & Co informed the defendant that the plaintiff would like to secure permission from the defendant, to appeal for a consent of the Director of Land and Survey, Sarawak, for the transfer of the said land, and that the plaintiff was confident that the appeal would meet the approval requirement of the Director of Land and Survey, Sarawak but the defendant refused to permit the plaintiff, to appeal to the said director.

[21] The plaintiff then filed High Court Suit No BTU-22–5/9 of 2013.

THE JUDGMENTS BELOW

[22] The learned High Court judge set out three key issues for decision as proposed by the defendant:

(i) whether the contract for sale of the said land has become impossible to perform and was therefore frustrated and void for the reason that the application by Messrs Kadir Wong Lin & Co Advocates vide its letter dated 30 January 2013 for consent for the transfer of the title of the said Land (Lot 2072 Block 26 Kemena Land District) was rejected on the ground that the application '*tidak dapat dipertimbangkan*';

(ii) whether the plaintiff is entitled to specific performance of the contract or damages for breach of contract or otherwise; and

(iii) whether the caveat lodged by the plaintiff on Lot 2072 Block 26 Kemena Land District vide Land Instrument L703/2013 registered on 8 February 2013 at the Bintulu Land Registry Office ought to be removed.

[23] Regarding the first issue, the learned High Court judge held that the defendant had failed to prove that the contract for sale of the said land has become impossible to perform and was therefore frustrated. The learned High Court judge reasoned that both parties were fully aware of the requirement of the consent of the Director of Land and Survey, Sarawak and therefore there is no change of circumstances rendering a fundamental or radical change on the obligations originally undertaken and the rejection of the defendant's application for the requisite consent does not make the performance of the SPA

impossible as the defendant can still file a proper appeal against the said decision or re-file proper application without any erroneous particulars but the defendant chose not to do so.

[24] This is an important aspect of the case and it is appropriate therefore to set out what the learned High Court judge said (see pp 31–32 of R/P, Vol I Part A record of appeal):

> 32. From the evidence adduced, this Court finds that the initial appeal by the Defendant for the requisite consent was flawed in that the material particulars of the said Land was wrong and that the application was sent to the wrong party. The Defendant ought to have either resubmit another application containing the correct particulars of the said Land and to the proper person or lodged and appeal after rectifying the defects in the initial application. The Defendant decided or omitted to do either. Instead the Defendant then proceeded to repudiate the SPA, relying on frustration. This showed that the Defendant had no intention to complete the SPA. Furthermore there was evidence adduced, to show that chances of an appeal succeeding is high.
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> 33. This Court finds that from the testimony in cross- examination of DW1 — Lau Keat Hoo, he was fully aware of the fact that there was no problem of getting consents for the transfer of lands used for industrial purposes as all industrial lands in Bintulu contained similar special conditions in Bintulu and it is a routine application/procedure for Bintulu conveyancing solicitors, for such lands. ...

[25] As to the second issue, the learned High Court judge rejected the argument put forward by learned counsel for the plaintiff that as there was a binding agreement for the said land between the parties and at all the times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA, specific performance of the agreement ought to be granted against the defendant in Suit No BTU-22–5/9 of 2013.

[26] His Lordship's reasons for rejecting this argument were as follows:

> 51. In *Kong Ming Finance Corp Bhd v Topical Habitat Sdn Bhd* [1990] 3 MLJ 243, whereby Chong Siew Fai J (as he then was) held as follows:
>
> > In my opinion, the court ought not lend its hand to grant the relief as sought in protection of an interest arising from a dealing the creation of which requires express consent which had not been obtained, and the performance of which relief, if granted and if capable of having it enforced upon the vendor as the registered landowner to perform, would contravene an express provision of the law and render the registered landowner liable to committing an offence and his land liable to forfeiture. In other words, there can, in my view, be no question of the alleged contractual right of the applicant being capable of specific performance since an order of specific performance as claimed would, in the circumstances, be tantamount to authorizing the applicant to enforce or to compel the vendor or his estate (if compellable) or to compel the borrower to do something which is prohibited by the document of title relating to the said land,

thereby rendering the registered landowner liable to be guilty of an offence or the said land liable to forfeiture under.

52. Since the consent of the Director of the Lands and Survey Department is required for the transfer of the said land and applying the reasoning of Chong Siew Fai J (as he then was) in the case of *Kong Ming finance Corp Bhd v Tropical Habitat Sdn. Bhd* where his Lordship held that the court ought not to lend its hand to grant relief which requires express consent which had not been obtained, and should the relieve be granted, the performance of which relief, would contravene an express provision of the law, this Court shall not grant an order of specific performance of the SPA against the defendant.

[27] Concerning the third issue, the learned High Court judge concluded that based on the evidence adduced at trial, the plaintiff has proved its interests in the said land which is caveatable by virtue of the written contract ie the SPA which the parties have mutually agreed to be bound by it. His Lordship referred to cl 8 of the SPA which stipulates as follows:

The Vendor hereby agrees and allows the Purchaser to lodge a Caveat against the said Land upon signing of this Agreement.

[28] In support of his decision, the learned High Court judge relied on the cases of *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 and *Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* [2007] 7 MLJ 23.

THE APPEAL NO Q-02(W)–809–04 OF 2016

[29] The principal issue in Appeal No Q-02(W)-809–04 of 2016 is whether the learned High Court judge erred in holding that there is no frustration of the contract. Learned counsel of the defendant has spiritedly argued that the transfer of the said land is subject to the consent of the Director of Land and Survey Sarawak and there is no provision in the SPA to cater or provide for the event when the Director refused to grant consent or rejected the application for a consent.

[30] Additionally, learned counsel submitted that the learned High Court judge erred both in fact and law in ruling that there is no frustration of contract when in fact the request by the defendant for an appeal against the decision of the Director of Land and Survey Sarawak cannot possibly be agreed by the defendant as the terms imposed by the defendant for the appeal is offensive and beyond the scope of the contract. The offensive conditions placed on the defendant were stated in the plaintiff's advocates' letter dated 18 March 2014 which stated that:

In order to resolve the problem if any, we are instructed that our client is prepared to pay the balance of the purchase price *provided however that you shall duly execute all the necessary instruments and documents including the Memorandum of Transfer,*

> *Power of Attorney with full powers to do all matters as the registered proprietor could do personally* and the written permission to appeal or re-submit the application for consent of the transfer of the said Property in favour of our client. (Emphasis added.)

[31] Learned counsel also argued that the plaintiff had clearly intended to subject the defendant to an endless string or process of appeals and re-submission when in fact frustration had already occurred when the Director of Land and Survey Sarawak rejected the consent on 12 March 2013. Learned counsel posited that the rejection of consent to transfer the said land to the plaintiff by the director had radically changed the circumstances of the case as transfer of the said land had become impossible. Reliance was placed on the case of *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695 and s 57 of the Contracts Act 1950.

[32] In reply, learned counsel for the plaintiff submitted that there is no basis for the defendant to contend that the SPA had become frustrated because the defendant failed to perform its obligation in the SPA and the refusal by the defendant to re-submit or appeal to the director for the requisite consent is self-induced frustration.

THE PRINCIPLES OF INTERPRETING A CONTRACT

[33] Before we proceed to dwell on the merits of the grounds of appeal put forward by the defendant, perhaps it would be useful to state at the outset the principles of interpreting a contract. In interpreting an agreement or contract, the general rule is that words ought to be given their ordinary and natural meaning and that the intention of the parties must be considered. The court must consider the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (see *Chitty on Contracts*, (29th Ed), paras 12–043).

[34] In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, the Federal Court set out the principles or guidelines for courts to follow in determining whether a binding agreement has come into existence to ensure that the law leans in favour of upholding bargains and not in striking them down willy-nilly whereby Gopal Sri Ram JCA, (as he then was), in the judgment of the Court of Appeal at p 335D–H observed:

> Unless the approach we have stated is adopted, a party to a contract who — after having concluded his bargain — entertains doubts as to the wisdom of the transaction, may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise.

Businessmen would find the law to be a huge loophole and commerce would come to a virtual standstill.

The law leans in favour of upholding bargains and not in striking them down willy-nilly, and its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494 where he said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

This principle applies not only to documents drafted by laymen, but also to those prepared by lawyers (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99).

[35] In *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285; [1985] CLJ Rep 77, Mohd Azmi FCJ in the judgment of the Federal Court held at p 82a–c:

> The general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it (see *National Coal Board v Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555). Mr Sethu has drawn our attention to p 560, the judgment of Piers Ashworth QC which states:
>
> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are:
> >
> > (1) construction of a contract is a question of law;
> >
> > (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case);
> >
> > (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later;
> >
> > (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

We have no quarrel with the principle of construction that a contract must be construed as at the date it was made.

THE DOCTRINE OF FRUSTRATION

[36] In Malaysia, the doctrine of frustration is embodied in s 57 of the Contracts Act 1950 ('Act 136'). Section 57(2) of Act 136 stipulates as follows:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[37] In *Guan Aik Moh (KL) Sdn Bhd*, Gopal Sri Ram JCA (as he then was) stated that there are three elements woven into the fabric of the doctrine of frustration:

(a) the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them;

(b) the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective; and

(c) the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

[38] On a plain reading of sub-s 57(2) of Act 136, it is evident that the section envisages some impossibility or unlawfulness of the act which the parties had not contemplated. It leads to a pertinent question as to what is such impossible act that would lead to frustration of contract. The courts, both in India and England, have held that the words 'impossibility' used in s 57 of Act 136 must be interpreted in a practical form and not in its literal sense. Thus, a contract would come under the purview of s 57 of Act 136 even if it is not an absolute impossibility, but the contract has fundamentally changed, which the parties did not contemplate at the time of the agreement (see *Satyabrata Ghose v Mugneeram Bangur & Co* 1954 AIR 44 and other judgment of English courts).

[39] Section 57 of the Act 136, however, may not be applicable in situation of self-induced frustration. If the frustration is procured by, or the fault of, either party to the contract, the party at fault cannot thereafter assert that the contract has been frustrated. Self-induced frustration is not, in the eyes of the

law, frustration. A case on point is *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226. Here, a charterer already in breach of contract ordered a ship to steam into a war zone, where the ship was immediately detained. It was held by the court that the charterer could not thereafter rely on the fact of the ship's detention as a ground for frustration of contract. A negligent act by the defendant may well amount to self-induced frustration because such an event is not altogether outside the control of the defendant; indeed, he is the (albeit unintentional) author of it (see, inter alia, *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd, The Kingswood* [1942] AC 154).

[40] In *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, the respondents were the owners of a ship (the St Cuthbert) that had been chartered by the appellant. The ship was fitted with, and could only operate with, a type of narrow-mesh fishing net known as an 'otter trawl'. When the charter party was renewed, both parties knew it was illegal to use an otter trawl without a government licence. The appellant owned five trawlers and applied for five licences; only three licences were granted, and the appellants were free to choose which of their five ships would be covered. They deliberately excluded the St Cuthbert, given the free choice to include it. They were sued for the charter fee, their defence being that the charter party was frustrated because it would be illegal to fish with the St Cuthbert. Unsurprisingly, the court held that the contract had not been frustrated because the allegedly 'frustrating' event had been self-induced by the appellant. In other words, the absence of the licence had been caused by the appellants' own actions, and could not therefore be deemed a frustrating event. Accordingly they were liable to pay for the hire.

[41] In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 1 Lloyd's Rep 148, Hobhouse J sought to define self-induced frustration as a 'label' that has been employed by the courts to describe those situations in which one party has been held by the courts not to be entitled to treat himself as discharged from his contractual obligations. Hobhouse asserted that frustration is self- induced where the alleged frustrating event was caused by the breach or the anticipatory breach of contract by the party claiming frustration, or where an act of the party claiming frustration broke the chain of causation between the alleged frustration and the event, making performance impossible.

[42] Ultimately, this case reached the Court of Appeal in *Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1. The defendants had two vessels capable of doing this work (the Super Servant One and the Super Servant Two). The contract left the choice of vessel to the defendants. The Super Servant Two sank before the contract was performed. Prior to the sinking the defendants had decided to use that ship to transport the claimants' drilling rig and the Super Servant One had been contracted to do another job.

[43] It was held that the contract had not been frustrated by the sinking of the Super Servant Two. Upon the sinking of the ship the defendants had still been free to perform their contract with the claimants by using its sister ship, the Super Servant One. In the Court of Appeal, Lord Bingham held that frustration should not:

> ... depend on any decision, however reasonable and commercial, of the party seeking to rely on it.

[44] We have critically considered the evidence on record, the judgment of the learned High Court judge and the submissions of learned counsel on both sides, for which we are grateful. We are of the view that the learned High Court judge was on firm ground when he held that the defendant had failed to prove the three elements mentioned under the doctrine of frustration in *Guan Aik Moh (KL) Sdn Bhd* or s 57 of the Contracts Act 1950.

[45] We are persuaded, on the reasons proffered by the learned High Court judge, that the defendant's refusal to re-submit or appeal to the director for the requisite consent is self-induced frustration.

[46] Learned counsel for the defendant took us through the following facts and/or evidence in support of the learned High Court judge's decision that it is clearly a self-induced frustration:

(i) that the defendant had failed to strictly comply with the requirement of the special condition of the land title (viii) as it did not submit a proper application directly to the Director of Land and Survey Sarawak;

(ii) that the defendant had submitted the purported application to the Superintendent of Land and Survey of Bintulu Division instead;

(iii) that from the testimonies of the two subpoenaed independent witnesses firstly, PW1, Mr Ting Kok Tiong — the common solicitors for both parties, the irrefutable evidence that the defendant had refused or neglected to appeal directly to the Director of Land and Survey Sarawak for the requisite consent even though the plaintiff requested the defendant to do so;

(iv) that another subpoenaed witness, PW3, Dato' Sajeli bin Kipli, the Director of Land and Survey Sarawak, being the person/post-named in the special condition of the title of the said land whose written consent was required for the transfer of the said land, testified and referred to other identical or similar special condition of other land in Bintulu which requires 'the consent in writing of the Director of Lands and Surveys' for their transfers. PW3 testified that all these other land also required consent in writing from the Director of Land and Survey to

transfer these lands which are 'conditioned for industrial land purposes' 'to ensure that the land is utilised for the stated purpose';

(v) that PW3 referring to p 20 of Bundle E (see p 446 of R/A Vol 3 Part C), testified that the letter of application for permission to deal was 'addressed to the Superintendent of Land and Survey Department' of Bintulu Division. In other words, there was no application to him or addressed directly to him pursuant to special condition (viii) of the title condition of the said land;

(vi) that with further reference to the application for permission to deal itself at pp 81–83 of Bundle E (see pp 507–509 of R/A Vol 3 Part C), PW3 — the Director compared the 'description of land under the term of title and date of registration of title under this application with the printout title of the said land at pp 16–17 of Bundle E' (see pp 440–441 of R/A Vol 3 Part C) and testified, 'that in 'the document at p 81 (see p 507 of R/A Vol 3 Part C), it stated the term of title is (perpetuity) while the date of registration of title is 22 November 1996' when in fact it was stated in the printout of title of the said land at p 16 (see p 16 of R/A Vol 3 Part C), that 'the term of title ... is stated as 60 years whereas the date of registration here is recorded as 15 August 2012'. In other words, the application for the requisite consent itself contained material errors or misrepresentation of facts on the respective descriptions of the said land and the date of registration of title;

(vii) that while referring to p 84 of Bundle E (see p 510 of R/A Vol 3 Part C), which was a letter, referring to a reply to another letter at p 20 of Bundle E (see p 446 of R/A Vol 3 Part C), PW3 testified that the letter at p 84 (see p 510 of R/A Vol 3 Part C) was issued by the Superintendent of Land and Survey Department Bintulu Division, which conveyed a decision, rejecting the defendant's application for the requisite consent. According to PW3, the defendant has two options, firstly to abandon the application if it refused to pursue or secondly, continue with the transfer or to submit an appeal if it wished to pursue or continue with the transfer. The defendant in the present case, decided not to appeal and opted to repudiate the contract and to refund the said deposit and part payment of the purchase price of the said land notwithstanding the plaintiff's request to lodge a proper appeal;

(viii) that it was not disputed that there was no appeal lodged to the Director of Land and Survey Department. PW3 confirmed this. In his testimony, PW3 also testified that the initial rejection was appealable and it was known to the parties in this action that there was an appeal procedure for lodging an appeal to the Director against the non-granting of the consent. PW3 also testified in cross-examination that the purported appeal at pp 21–22 of Bundle E (see pp 442–448 of R/A Vol 3 Part C) which was addressed to the Superintendent of Land and Survey Bintulu

Division, which was issued by Kadir, Wong, Lin & Co, the common solicitor, was never delivered or send. Hence, no appeal was ever lodged;

(ix) that the defendant refused to lodge an appeal to the director for the said requisite consent even though the initial application was flawed and the chances of a successful appeal was high. In cross-examination, DW1, Lau Keat Hoo testified as follow:

Q: Refer to page 90 of Bundle E (see p.516 of R/A Volume 3 Part C). I put it to you the Defendant do not wish to appeal for the approval of consent to be considered by the Director of Lands and Surveys.

A: I agree but time is of the essence and one of the condition as I have explained earlier in the title clause (v) which has given us a short time frame to develop the land and we risk losing the land if we do not develop the land by 2019.

(x) that on the same issue, PW1,Ting Kok Tiong, being the common solicitor for both parties herein testified as follows:

Q19: Refer to the letter dated 20 May 2013 at page 90 of Enclosure 60 (Bundle E) (See p.516 of R/A Volume 3 Part C), was this letter issued or signed by you? What is this letter about?

A19: Yes, I was the maker of the letter. Before I issued this letter, Mr Chieng Kai Chai of the Plaintiff had requested me to make presentation or appeal directly to the Director of Lands & Surveys for the consent to transfer the said land, so I had written this letter to the Defendant seeking oft its instruction. Given the fact that I was acting for both parties and for such application or appeal for the said consent, I had to get the mandate from the Defendant. When I issued that letter, I hoped the parties could resolve the dispute but toward that end, I need to get the mandate and instruction from both parties.

Q20: Did you get any instruction or response from the Defendant in respect of your letter at page 90 of Enclosure 60 (Bundle E) (see p.516 of R/A Volume 3 Part C)?

A20: No.

[47] It is clear, therefore, that the doctrine of frustration applies only in circumstances where the supervening event is beyond the control of the parties to the contract. It follows that where the alleged frustrating event is caused by the deliberate act or decision of one of the parties, or by his negligence, the doctrine will not apply. In the book by *Sinnadurai on the Contracts Act, A Commentary*, LexisNexis (2015) on s 57(2) of the Contracts Act 1950, it was stated at para 57.25 that:

Self-induced Frustration

[57.25] Principles applicable

As a general rule, a party cannot rely on the doctrine of frustration as a defence for non-performance of a contract, if he himself had been responsible for bringing about the frustrating event; that is the event which a party relies upon as frustrating his contract must not be self-induced.

The Malaysian courts have also applied this common law principle: see *Dato Yap Peng v Public Bank Bhd* [1997] 3 MLJ 484, CA. The failure of the state government, one of the parties to a consent order, to perform its obligation under the order to secure an alienation of land by the relevant state authority to the other party when the state authority refused to alienate the land, was held to be a 'self-induced frustration' by the Court of Appeal in *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu* [2000] 2 MLJ 699, CA. The refusal of the relevant state authority 'was a deliberate act of non-compliance of the consent order'; it was not a supervening event, and therefore it was not open to the respondent to rely on the doctrine of frustration.

In *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1, CA, the Court of Appeal held that a contract was not frustrated when a purchaser of a commercial property was unable to obtain a bank loan to pay the balance of the purchase price as the purchaser refused to accept the new conditions imposed by the bank in accordance with the requirements of Bank Negara. The Court of Appeal also held that if at all there was frustration, it was 'self-induced frustration' under the circumstances. The case of *Dato Yap Peng v Public Bank Bhd* [1997] 3 MLJ 484, CA. was applied.

[48] In *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34; [2014] 7 CLJ 293, the Court of Appeal held that the party who seeks to rely on frustration must be a party who is not at fault and no blame can be imputed to him as it is trite law that a 'self-induced frustration' does not discharge a party of his contractual obligations. Abdul Malik Ishak JCA in the judgment of the Court of Appeal explained at p 315E–318D:

[30] The word 'impossible' is not defined in the Contracts Act 1950. Section 57(2) of the Contracts Act 1950 envisages the situation where the contract becomes frustrated. Frustration puts an end to the contract. Frustration arises after the formation of the contract. The party who seeks to rely on frustration must be a party who is not at fault and no blame can be imputed to him. Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) sets out the test to determine frustration at p 729 of the report in these erudite terms:

> ... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

...

[33] Abdul Hamid Omar FCJ (later the Lord President of the Supreme Court) in *Ramli Zakaria & Ors v The Government of Malaysia,* at p 262, stated the law lucidly in this way:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

[34] The scope of s 56 of the Indian Contract Act which is equivalent to our s 57 of the Contracts Act 1950 was examined by the Indian Supreme Court in *Satyabrata Ghose v Mugneeram Bangur & Co And Another* [1954] AIR SC 44. There, Mukherjea J had this to say at pp 317–318 of the report:

> The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done ... This much is clear that the word 'impossible' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view and if an untoward event or change of circumstances totally upset the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

[35] However, it must be borne in mind that '*the doctrine of frustration is to be confined to very narro w circumstances, the reason being, I think, that commercial bargains should not be lightly avoided or brushed aside merely upon a change of circumstances*' (per Abdul Malik bin Ishak JC in *Ooi Yoke In & Anor v Public Finance Bhd* [1992] MLJU 25; [1993] 2 CLJ 464; [1993] 1 AMR 734, at p 742). And where the doctrine of frustration applies, the court will not grant specific performance (*Chong Wan Kum v Wan Choong* [1983] 1 CLJ 193; [1983] CLJ Rep 512).

[36] It is trite law that a '*self-induced frustration*' does not discharge a party of his contractual obligations. In this connection, reference should be made to the following cases:

(a) *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] All ER Rep 86; [1935] AC 524 (PC);

(b) *Dato Yap Peng v Public Bank Bhd;*

(c) *Lauritzen (J) AS v Wijsmuller BV, The Super Servant Two* [1990] 1 Lloyd's Rep 1 (CA);

(d) *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 (HL);

(e) *H A Berney v Tronoh Mines Limited* [1949] 1 MLJ 4; [1947] 1 LNS 30;

(f) *Tan Hiow v Lee Boon Chia* [1958] 3 MC 173;

(g) *Sykt Angkasa Bumiputra v Sabah Land Development Board* [1987] 1 CLJ

90; [1987] CLJ Rep 997;

(h) *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139; [1996] 1 LNS 89; and

(i) *Cheok Hock Beng & Ors v Lim Thian Siong & Anor* [1992] 2 CLJ 1100; [1992] 4 CLJ Rep 187.

> [37] The doctrine of frustration does not protect a party whose own breach of the contract brings about the frustrating event. Thus, a charterer who in breach of the contract, orders a ship into the war-zone, thereby causing the ship to be detained, cannot rely on the detention as a ground of frustration. It is in fact a *self-induced frustration* (*Ocean Tramp Tankers Corporation v V/O Sovfracht* [1964] 1 All ER 161; [1964] 2 QB 226 (CA); and *Uni-Ocean Lines Pte Ltd v C-Trade SA, The Lucille* [1984] 1 Lloyd's Rep 244 (CA). And according to LP Thean JA in *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393 (CA), at p 403, the doctrine of frustration is dependent on the facts of the case. Everything boils down to the facts of the case. The present appeal is not an exception. (Emphasis added.)

[49] The evidence on record showed that at all times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the SPA for the purchase price of the said land but the refusal of the plaintiff to perform its end of the bargain by self-induced frustration.

[50] In the premises, the challenge by the plaintiff on the ground of frustration must fail.

THE CROSS-APPEAL

[51] Learned counsel for the plaintiff submitted that the learned High Court judge erred in not ordering specific performance of the contract against the defendant. It was contended that the actual intention of the parties as ascertained from the contract is to complete the sale of the said land with the payment of the balance of the purchase price stated therein. At all the times, the plaintiff was and still is able, ready and willing to perform all its contractual obligations under the contract of the said land and there was no reason for the plaintiff to refuse it.

[52] It was further contended that damages are inadequate. As the subject matter of the contract is real property which is well established as unique property and true substitute cannot be found. The specific performance of the contract is the only available remedy. Reliance was placed on s 11(2) of the Specific Relief Act 1950 which stipulates as follows:

> unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[53] The following cases were cited in support of his submission:

(a) *Chow Chin Thong @ Chau Chin Tang v Dr Chong Eng Leong @ Ching Eng Leong (sued as the administrator of the estate of Ku Hui Kin @ Ku Hui Kim)* [2010] MLJU 942; [2012] 10 CLJ 273;

(b) *Loh Koon Moy & Anor v Zaibun SA bt Syed Ahmad* [1978] 2 MLJ 29;

(c) *Sivapragasam s/o Nagamany v Amaravathy d/o v Nadeson & Puvaneswary d/o As Lingam* [2001] MLJU 715; [2001] 8 CLJ 706;

(d) *Reignmont Estate Sdn Bhd v Jaya Ikatan Plantations Sdn Bhd* [2014] 5 CLJ 134;

(e) *Bandar Eco-Setia Sdn Bhd v Yiap Beow Soon and Anor* [2009] MLJU 1388; [2010] 5 CLJ 556;

(f) *Tan Ah Tong v Parveen Kaur* [2011] 5 MLJ 428; [2012] 10 CLJ 159; and

(g) *Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd* [1995] 3 MLJ 192.

[54] Learned counsel for the plaintiff posited the failure of the defendant to obtain the requisite consent does not bar specific performance (see *Agrokor Sdn Bhd v Perkayuan TM (Malaysia) Sdn Bhd* [2015] MLJU 961; [2015] 6 CLJ 594).

[55] The learned High Court judge expressed reservations about the propriety of an award of specific performance in the circumstances of the case. We are in full agreement with the learned High Court judge's refusal to grant relief which require express consent which had not been obtained, and should the relief be granted, the performance of which relief would contravene an express provision of the law. We agree that the court, in the circumstances of the case, should not grant an order of specific performance of the SPA against the defendant.

[56] We are mindful that there is a long line of common law authority that specific performance is the default and appropriate remedy for a contract for the sale and purchase of land. Gareth Jones & William Goodhart, *Specific Performance* (Butterworth's, 2nd Ed, 1996) stated that (at p 32):

> ... damages are said to be impossible to assess if the contract is for the sale of, or for the disposition of, an interest in, land. Land is unique; it has a 'peculiar and special value'. Consequently, no enquiry is ever made whether damages would be an adequate remedy and would make the injured party whole. This is so even if the land is bought for resale or is one of hundreds of apparently alike apartments in a large commercial development. It is perhaps not surprising that specific performance should be granted to a purchaser of land as a matter of course even in

these situations; a court does not enquire why a party enters into a contract, and no apartment is quite like its neighbour ... (emphasis in original) ...

[57] We take the stand that it cannot be assumed that damages for breach of contract for the purchase and sale of immovable property will be an inadequate remedy in all cases.

[58] In *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at p 519, the Privy Council observed that, in some circumstances, no distinction could be drawn between land sale contracts and other commercial contracts because 'land can also be an article of commerce and a flat in Hong Kong is probably as goal an example as one could find'. This observation clearly implies that damages could be an adequate remedy in contracts involving land.

[59] In *Semelhago v Paramadevan* [1996] 2 SCR 415, the availability of specific performance to the purchaser was not in issue, as the parties had conducted the case on the basis that it was available. However, the Supreme Court made statement by way of dictum that are the basis of the later decisions of the Alberta Court of Appeal.

[60] Sopinka J gave the majority judgment in *Semelhago*. He said at para 14:

... Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance.

He continued at paras 20–22:

... While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognised that the distinction might not be valid when the land had no peculiar or special value.

Courts have tended, however, to simply treat all real estate as being unique and to decree specific performance unless there was some other reason for refusing equitable relief... Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available ... Before a plaintiff can rely on a claim to specific

A performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

B **[61]** In this instant appeal, there is no evidence on record to show that the said land is unique in the sense that there is no readily available substitute. The said land has not been uniquely identified by the parties in the SPA or in the trial.

C **[62]** We conclude, therefore, that in the circumstances of this instant appeal, damages will be an adequate remedy in the absence of evidence to show 'uniqueness' of the said land.

ASSESSMENT OF DAMAGES

D

[63] That, however, is not the end of the matter. Learned counsel for the plaintiff submitted that the assessment of damages should be left to the discretion of senior assistant registrar who decides it according to the evidence to be addressed; the facts and circumstances of the case to be proved on the E hearing of the assessment with no restriction or condition attached by the learned High Court judge as to what method of computation or how the principles of assessment of damages shall be applied.

F **[64]** Learned counsel for the plaintiff submitted that there was nothing to justify the learned High Court judge in making the award of damages in lieu of specific performance under either (i) s 75 of the Contracts Act 1950; *or* (ii) cl 6 of the SPA.

G **[65]** There is force in the submission. In our view, if the specific performance is not granted, it is an open issue how damages ought to be assessed or whether cl 6 of the SPA is open to be challenged at the hearing of the assessment of damages.

H **[66]** Additionally, we also agree with the submission of learned counsel for the plaintiff:

(a) that as s 75 of the Contracts Act 1950 or cl 6 of the contract for the assessment of damages were also not pleaded and adjudicated by the parties at the trial and dealt with by the parties in submission at the conclusion of the trial and in the grounds of the judgment, the learned I trial judge should not have made such order for the assessment of damages under s 75 of the Contracts Act 1950 or cl 6 of the contract at the clarification on 24 March 2016; and

(b) that after making the decision as stated in the grounds of the judgment on 18 March 2016, the learned trial judge was functus officio as far as the issue of damages is concerned.

[67] In the result, we varied the order of the learned High Court judge in that the parties are at liberty to submit on the approach to be taken in the assessment of the damages before senior assistant registrar.

APPEAL NO Q-02(A)-810–04 OF 2016 REMOVAL OF CAVEAT

[68] The learned High Court judge held that pursuant to cl 8 of the SPA, the defendant agreed and allowed the plaintiff to lodge a caveat against the said land upon signing the SPA. Consequently, the plaintiff lodged the caveat against the said land on 8 February 2013, about nine months after the SPA had been signed.

[69] The learned High Court judge reasoned that based on the facts of the case, the plaintiff was entitled to lodge the caveat at that material time. Reliance was placed on the case of *Macon Engineers Sdn Bhd*; *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212.

[70] With respect, we disagree. In our view, since the learned High Court judge had rejected the application for specific performance in respect of the said land and order the damages to be assessed by the learned senior assistant registrar, the plaintiff's only interest is monetary and the plaintiff no longer had any interest to preserve the caveat.

[71] Insofar as the balance of convenience is concerned, it is well established that a critical consideration is the financial status of parties. There is no evidence on record to suggest that the defendant's finances are shaky. We see no reason to believe, and the plaintiff had not suggested, that the defendant would not be financially unable to pay damages should the plaintiff prevails at the assessment of damages proceedings.

[72] Considering the above factors as a whole, we find that the balance of convenience is tilted in favour of removing the caveat. In the result, we allowed the defendant's appeal with no order as to costs.

CONCLUSION

[73] Having heard learned counsel for the parties and on perusal of the record of the case, we made the following orders:

Appeal No Q-02(W)-809–04 of 2016:

A (a) the appeal against the findings of the High Court judge that the SPA still subsists and that the doctrine of frustration does not apply is dismissed;

(b) the order of the High Court judge that damages in lieu of specific performances is awarded to plaintiff to be assessed by SAR is affirmed;

B

(c) parties are liberty to argue on the course to be taken in the assessment of damages before the SAR;

C (d) no order as to costs; and

(e) deposit to be refunded.

Appeal No Q-02(A)-810–04 of 2016:

(a) the appeal against the High Court's decision dismissing the defendant's counter claim or removal of caveat is allowed;

D

(b) no order as to costs; and

(c) deposit to be refunded.

E *Order accordingly.*

Reported by Ashok Kumar

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